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No. 86-329

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CORY GARDINER, et al.,
Petitioners,

v.

SEA-LAND SERVICE, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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22 pp 4 foldouts

QUESTION PRESENTED

It is settled maritime law that seamen may contract with respect to maintenance and other traditional rights if they are not overreached and receive *quid pro quo* for any diminution of such rights. It is equally settled under federal labor law that courts should be reluctant to interfere with the private bargaining process upon which collective bargaining rests. Petitioners were represented by their respective maritime labor unions in collective bargaining and are the beneficiaries of comprehensive benefits packages, which include an $8.00 per day maintenance rate, established in their collective bargaining agreements. Petitioners do not contend that these overall benefits packages are unfair or inadequate, but instead argue that, viewed in isolation, the maintenance rates are inadequate and unenforceable.

The question presented, therefore, is whether the United States Court of Appeals for the Ninth Circuit properly held that:

> (a) "when a benefits package includes an express reference to a precise rate of maintenance, the adequacy of this rate, considered in isolation, is not a subject for judicial speculation when the rate is part of a total package of wages and benefits resulting from the process of collective bargaining"

and correctly concluded that:

> (b) "the national labor policy of encouraging the use and reliability of collective bargaining agreements, together with the realistic give and take occurring within the collective bargaining process, justify enforcement of the specific rate of maintenance contained in the agreement here."

Gardiner v. Sea-Land Service, Inc., 786 F.2d 943, 949-50 (9th Cir. 1986).

LIST OF ALL PARTIES

Petitioners are: Cory Gardiner; William E. Bishop; William Wheat; Yung Kong Ho; Juan P. Sanchez; Eugene A. Carter and Alfonso Di Fabrizio.

Respondents are: Sea-Land Service, Inc.; Delta Steamship Lines, Inc.; American President Lines, Inc.; Keystone Shipping Co.; Lykes Bros. Steamship Co., Inc.; Matson Navigation Co.; United States Lines, Inc., and Chevron Shipping Company.*

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*Pursuant to Rule 28.1 of the Rules of the United States Supreme Court, respondents hereby list their parent corporations and less than wholly owned subsidiaries and affiliates. Sea-Land Service, Inc. is a wholly owned subsidiary of Sea-Land Corporation. CSX Corporation, through its wholly owned subsidiary CSA Acquisition Corporation, has offered to purchase all outstanding shares of Sea-Land Corporation, pending approval of the acquisition by the Interstate Commerce Commission. Buyers Consolidated, Inc., Arabian Container Terminals Limited and Sea-Land Container Terminal Administration Co., Ltd. are less than wholly owned subsidiaries or affiliates of Sea-Land Service, Inc. All other subsidiaries of Sea-Land Service, Inc. are wholly owned.

Delta Steamship Lines, Inc. is a wholly owned subsidiary of Crowley Marine International, Inc. which, in turn, is a wholly owned subsidiary of Crowley Maritime Corporation. Liberian Development Corp. is a less than wholly owned subsidiary of Delta Steamship Lines, Inc. All other subsidiaries of Delta Steamship Lines, Inc. are wholly owned.

American President Lines, Inc. is a wholly owned subsidiary of American President Companies, Ltd. All subsidiaries of each company are wholly owned.

Keystone Shipping Co. is owned by Chas. Kurz & Co., Inc. Keystone Tankship Corporation is the only less than wholly owned subsidiary of Keystone Shipping Co.

Lykes Bros. Steamship Co., Inc. is a wholly owned subsidiary of Interocean Steamship Corp. which, in turn, is owned in various percentages by the following companies: Shore Management, Inc., Carondelet Street Corp., Edgelake Corp. and McCormick Management Corp. Lykes Bros. Steamship Co.'s only subsidiary is wholly owned.

Matson Navigation Co., Inc. is a wholly owned subsidiary of Alexander & Baldwin, Inc.

United States Lines, Inc. is a wholly owned subsidiary of First Colony Farms, Inc. which, in turn, is a wholly owned subsidiary of McLean Industries, Inc. All subsidiary or related companies of United States Lines, Inc. are wholly owned by either United States Lines, Inc. or McLean Industries, Inc.

Chevron Shipping Company intends to file its own brief in opposition to the petition for writ of certiorari and will provide therein the information required by Rule 28.1

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Procedural Summary

Petitioners are members of various maritime unions and purport to represent several thousand similarly situated union seamen.[1] Petitioners brought suit in August 1983 seeking to invalidate the "maintenance" provisions of their collective bargaining agreements. Those agreements currently provide for maintenance to be paid at the rate of $8.00 per day. Respondents moved to dismiss the action or for summary judgment, arguing

[1] Petitioners Gardiner, Ho and DiFabrizio are members of the Seafarers International Union ("SIU"); petitioner Sanchez is a member of the Marine Engineers Beneficial Association ("MEBA"); petitioners Wheat and Bishop are members of the National Maritime Union ("NMU"); and petitioner Carter is a member of the Marine Fireman's Union ("MFU").

that the collectively-bargained rates of maintenance were binding upon petitioners as a matter of federal labor and maritime law. Relying upon its earlier decision in *Rutherford v. Sea-Land Service, Inc.*, 575 F. Supp. 1365 (N.D. Cal. 1983), the district court denied the motion and certified the question to the United States Court of Appeals for the Ninth Circuit, pursuant to the agreement of all parties.

The Ninth Circuit reversed, finding that as a result of the "give and take" of collective bargaining, petitioners' unions had negotiated a comprehensive benefits package which included contractually specified rates of maintenance. The Court of Appeals concluded that the broad policies which underlie federal labor law required that the maintenance rates be enforced, holding that:

> when a benefits package includes an express reference to a precise rate of maintenance the adequacy of this rate, considered in isolation, is not a subject for judicial speculation when the rate is part of a total package of wages and benefits resulting from the process of collective bargaining. *Gardiner v. Sea-Land Service, Inc.*, 786 F.2d 943, 949 (9th Cir. 1986).

Accord Hodges v. Keystone Shipping Co., 578 F. Supp. 620 (S.D. Tex. 1983); *Grove v. Dixie Carriers, Inc.*, 553 F. Supp. 777 (E.D. La. 1982). *See also Reardon v. California Tanker Co.*, 260 F.2d 369 (2d Cir. 1958), *cert. denied*, 359 U.S. 926 (1959).

B. The Right To Maintenance

Maintenance, as described by the Court of Appeals, is:

> the duty of a shipowner to provide food and lodging to a seaman who falls ill or becomes injured while in the service of the ship. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 528, 58 S.Ct. 651, 653, 82 L.Ed. 993 (1938). The right to maintenance is tied to the right to cure, i.e., necessary medical services, and both extend to the point of "maximum recovery." *Vaughn v. Atkinson*, 369 U.S. 527, 531, 82 S.Ct. 997, 999, 8 L.Ed. 2d 88 (1962). In addition, a seaman is entitled [to] recover unearned wages. *The Osceola*, 189 U.S. 158, 175, 23 S.Ct. 483, 487, 47 L.Ed. 760 (1903); Norris, *The Law of Seamen* § 26.7 at 15-16 (4th ed. 1985). In sum,

> the elements of the common law maintenance and cure action included a living allowance during the recovery period (maintenance), reimbursement for medical expenses (cure), and unearned wages for the period from the onset of injury or illness until the end of the voyage. Gilmore and Black, 281, 305, 309. *Gardiner, supra*, 786 F.2d at 945-46.

Maintenance, like its counterpart "cure," is a legally imposed term and condition of the seaman's contract of employment, first recognized in the maritime law of the United States by Justice Story in *Harden v. Gordon*, 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6,047), long before the advent of national labor laws and unionization of seamen. The court in *Harden* specifically recognized that seamen can legally contract with respect to maintenance (and other traditional rights) so long as they are not overreached and receive compensation (*i.e., quid pro quo*) "entirely adequate to the diminution of the right or privilege on the part of the seamen." *Id.* at 485.

The seaman's ability to contract with respect to his terms and conditions of employment, including maintenance, has been consistently recognized and upheld where the seaman has not been overreached and receives an adequate *quid pro quo* for any diminution of his rights. *See, e.g., Law v. United Fruit Co.*, 264 F.2d 498, 499-500 (2d Cir.), *cert. denied*, 360 U.S. 932 (1959); *Clinton v. United States*, 254 F.2d 409, 410-11 (9th Cir. 1958), *cert. denied*, 358 U.S. 941 (1959); *Bonici v. Standard Oil Co.*, 103 F.2d 437, 438-39 (2d Cir.), *cert. denied*, 308 U.S. 560 (1939); *Brown v. Lull*, 4 F. Cas. 407, 409 (C.C.D. Mass. 1836) (No. 2,018); *Zoldan v. American Export Isbrandtsen Lines, Inc.*, 1969 A.M.C. 471, 474 (S.D.N.Y. 1969), *aff'd per curiam*, 1970 A.M.C. 2177 (2d Cir. 1970); *The Atlantic*, 2 F. Cas. 121, 128 (S.D.N.Y. 1849) (No. 620). As the district court below expressly recognized, therefore, maintenance is a proper subject for bargaining between maritime unions and shipowners. *Rutherford, supra*, 575 F. Supp. at 1373; Petition for Writ of Certiorari ("Pet."), Appendix ("App.") B at B-1.

As set forth below, the Court of Appeals' decision is based upon the undisputed evidence introduced by respondents, is fully consistent with settled federal labor and maritime law, and is not

in conflict with the decisions of this Court or of other circuit courts. Accordingly, the Ninth Circuit opinion in *Gardiner* presents no issue for consideration by this Court and respondents respectfully submit that the petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT OF CERTIORARI

A. The Court Of Appeals Properly Found, And The Evidence Showed, That The Maintenance Provisions Of The Collective Bargaining Agreements Are Enforceable As One Part Of A Complete Benefits Package And Cannot Be Judicially Reviewed In Isolation

Petitioners have, from the beginning of this action, attempted to isolate the maintenance provisions of the collective bargaining agreements in an effort to portray those provisions as "starvation payments" and as "an inadequate allowance." Pet. at 4, 6. The Court of Appeals properly held, however, that the maintenance provisions cannot be viewed in isolation, but are part and parcel of a package of benefits which provide for seamen both on board ship and on shore. *Gardiner*, *supra*, 786 F.2d at 949. A review of those collectively-bargained benefits utterly dispels the notion that petitioners are poor and friendless, destined to live on a mere $8.00 per day. The undisputed evidence in the record below demonstrates that petitioners are the beneficiaries of a comprehensive and generous benefits packages negotiated by their unions which they enjoy shoreside as well as aboard ship.[2]

Petitioners' collective bargaining agreements regulate all aspects of their employment and indisputably include substantial benefits packages including wages, overtime pay, full health and welfare benefits, pensions and liberal vacation benefits in addition to maintenance.[3] Collectively-bargained benefits available to

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[2] Indeed, the Court of Appeals noted that petitioners had made "no allegation that the collective bargaining agreement as a whole is unfair or inadequate." *Id.* at 949.

[3] Certain of the benefits available to petitioners are summarized in Appendix A hereto which has been reproduced from respondents' reply

members of petitioners' unions include, *inter alia*, wage rates which range, exclusive of overtime, from $1,823.29 to $5,262.45 per month for MEBA members; $1,081.06 to $2,415.90 per month for SIU members; and $1,026.66 to $2,508.59 per month for NMU members. Unearned wages[4] and vacation pay are based upon these union wage rates. Members also receive premium and penalty pay for unpleasant tasks, substantial overtime pay and extremely liberal vacation benefits which range from one vacation day for each three days worked for SIU members to one vacation day for each day worked for some MEBA members. Union members may, and frequently do, receive pay in lieu of vacation time earned. Upon permanent disability or retirement, members receive pensions and the SIU and NMU pension plans provide spousal pensions and annuities, respectively.

Most significantly, the unions have negotiated health and welfare plans that far exceed the shipowners' historical duty to provide "cure" to the ill or injured seaman.[5] The undisputed evidence below showed that the MEBA Medical and Benefits Plan provides MEBA members and their dependents with coverage for all hospital confinements and surgical, maternity, major medical, dental and optical benefits, together with free medical examinations at Diagnostic Centers established by the Plan and reimbursement of transportation expenses incurred in traveling to

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brief in the Court of Appeals. The evidence of benefits available to petitioners individually and to maritime union members generally was undisputed in the courts below.

[4] Disabled seamen are entitled under maritime law to receive their unearned wages from the onset of injury or illness to the end of their contract of employment. Gilmore & Black, *The Law of Admiralty*, 309-10 (2d ed. 1975).

[5] The shipowner is required by maritime law to provide "cure" to the seaman disabled in the service of the ship only to the point of "maximum recovery." *Gardiner, supra*, 786 F.2d at 946. Accordingly, a permanently disabled seaman at "maximum cure" is *not* entitled to ongoing care at the shipowner's expense. This is in distinct contrast to the medical benefits and disability pensions provided to seamen and their dependents for shoreside as well as shipboard disabilities pursuant to petitioners' collective bargaining agreements.

such Diagnostic Centers. Significantly, in addition to maintenance, the MEBA Plan provides a $50 per week disability benefit to a MEBA member unable to perform his regular employment duties.

The SIU Welfare Plan provides major medical and other benefits, including hospitalization for any disability, maternity benefits, an alcoholic rehabilitation and counseling program, death and dismemberment benefits and a scholarship program for union members and their dependents. The SIU Welfare Plan also provides a sickness and accident benefit of $8.00 per day for up to 39 weeks, payable during any period when a disabled seaman would not otherwise be entitled to maintenance. The NMU Welfare Plan provides for a comprehensive major medical plan with a $250,000 lifetime maximum for members and their dependents. Additionally, the health and welfare plans provide that "the ill or injured seaman receives free transportation to his home port and a disability pension." *Gardiner*, *supra*, 786 F.2d at 949.

Petitioners themselves were direct beneficiaries of these comprehensive benefits packages. For example, petitioner Sanchez, a member of MEBA, was injured, and declared not fit for duty, on the 15th day of an 88-day voyage aboard a Sea-Land vessel. That same day, he received earned wages of $2,947, after authorized deductions. Following treatment at a hospital in Manila, Mr. Sanchez was flown to the United States by tourist class air, receiving (pursuant to the collective bargaining agreement) a payment of $831 for the differential between tourist and first class airfare. He received unearned wages of $2,369 for 73 days and was credited with vacation benefits of over $6,000 based on the entire 88-day voyage. In addition to maintenance, he was also eligible to receive the $50 MEBA weekly disability benefit. Finally, the MEBA Welfare Plan paid approximately $10,000 for Sanchez's hospital and medical bills.

Petitioner Bishop, a Lykes employee represented by the NMU, became ill and left the service of the ship on the 48th day of a 124-day voyage. He received unearned wages of approximately $2,800 for the remaining 76 days of the voyage. In addition to maintenance, and earned wages exceeding $3,000, he also re-

ceived vacation benefits of more than $3,000 based upon the full 124-day voyage.

Petitioner Wheat signed articles for a 42-day voyage, but left the vessel after 22 days because of an injury. In addition to earned wages of more than $2,000 and maintenance and cure, he received unearned wages of more than $1,400 and vacation benefits of approximately $2,200 based upon the entire voyage.

As summarized above, petitioners, like other union seamen, receive maintenance merely as one part of a comprehensive, collectively-bargained compensation and benefits package. Contrary to petitioners' intimations, they are neither starving nor forced to survive on their maintenance benefits alone. Instead, they enjoy the benefits of their collective bargaining agreements on shore as well as aboard ship. Like courts before it, therefore, the Ninth Circuit found that the collectively-bargained maintenance rates were enforceable because those maintenance rates were "part of an overall benefits package." *Hodges v. Keystone Shipping, supra*, 578 F. Supp. at 622; *Grove v. Dixie Carriers, Inc., supra*, 553 F. Supp. at 780.

The Court of Appeals also found that its holding was supported by the evidence of actual bargaining between the parties over the rate of maintenance.

> A second consideration which persuades us the bargained for rate should be enforced is that the facts in this case demonstrate that there was real bargaining over the maintenance rate. *In 1975 the Marine Engineers Beneficial Association requested an increase in the maintenance rate to $20.00 and in 1981 the Seafarers International Union asked for an increase to $12.00. Both proposals were withdrawn as part of the give and take of collective bargaining.* Thus, the parties have bargained for maintenance as a part of the overall benefits package. *Gardiner, supra*, 786 F.2d at 949 (emphasis added).

In summary, the evidence demonstrated that petitioners and their unions had bargained for and received *quid pro quo* for the specified rate of maintenance.[6]

B. The Court Of Appeals' Decision Is Consistent With Federal Labor Law And Policy

The Court of Appeals correctly held that, pursuant to federal labor policy, courts should refrain from interfering with the choice, freely made by petitioners through their unions during collective bargaining, to accept the specified rates of maintenance in return for other substantial benefits.

This Court has emphasized that federal labor policy rests upon the "fundamental premise" of "private bargaining under governmental supervision of the *procedure alone*, without *any official compulsion over the actual terms of the contract.*" *H.K. Porter Co. v. N.L.R.B.*, 397 U.S. 99, 108 (1970) (emphasis added). Courts must be reluctant to interfere with the collective bargaining process, for otherwise "[j]udicial rewriting of labor contract terms that are clear in both the language used and situations addressed would undermine [the] private bargaining process which federal labor policy promotes." *Irwin v. Carpenters Health & Welfare Trust Fund*, 745 F.2d 553, 557 (9th Cir. 1984).

The parties to the collective agreement are best able to determine how their relationship should be structured in the interests of all because, as this Court has stated, "[t]he mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time." *United Steelworkers of America v.*

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[6] Although not mentioned by the Court of Appeals, the non-union seaman may recover for maintenance *only* the amount of his own actual and reasonable expenditures and may not recover if he has incurred no such expense. *Johnson v. United States*, 333 U.S. 46, 50 (1948); *Mahramas v. American Export Isbrandtsen Lines*, 475 F.2d 165, 172 (2d Cir. 1973). In contrast, the union seaman is *not* required to offer proof of actual expenditures or the reasonableness of those expenditures in order to receive maintenance at the predetermined union contract rate. *Reardon v. California Tanker Co.*, *supra*, 260 F.2d at 374-75; *Grove v. Dixie Carriers, Inc.*, *supra*, 553 F. Supp. at 781.

Warrior & Gulf Nav. Co., 363 U.S. 574, 580 (1960). Thus, interference by the courts with the decisions made in collective bargaining is particularly to be avoided because a collective bargaining agreement is not merely a "private agreement, but rather an instrument of government." *Toyota Landscape Co. v. Teamsters*, 726 F.2d 525, 529 (9th Cir. 1984). In view of this comprehensive nature of a collective bargaining agreement, the "complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). A "wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose. . . ." *Id.* at 338.

Consistent with the foregoing principles, the Court of Appeals enforced the maintenance rates, concluding that it could not

> fairly say that this [maintenance] rate, as a consequence of the normal "give and take" process of collective bargaining, is not entitled to the same reliability accorded to other terms and conditions within the same agreement.
>
> * * *
>
> "The rate of maintenance is but one of many elements contained within the Union contract and over which the parties negotiate, and there may be a considerable amount of 'give and take' exercised by the parties in coming to a final agreement on all of the elements." *Grove v. Dixie Carriers, Inc.*, 553 F. Supp. 777, 780 (E.D. La. 1982).
>
> * * *
>
> The adequacy of the maintenance rate should not be examined in isolation by the court because the determination of its adequacy in relation to the whole scheme of benefits has already been made by the union and the seamen who voted for the contract. 786 F.2d at 949.[7]

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[7] The Court of Appeals also stressed that "courts which have held that seamen must receive more than $8.00 for maintenance were deciding on

Courts should respect the choices made in collective bargaining for the additional reason that doing so promotes industrial stability, a hallmark of federal labor policy. *Gardiner*, *supra*, 786 F.2d at 948. Singling maintenance out for judicial scrutiny from the total package of benefits negotiated by the parties would threaten industrial stability because "parties to a collective bargaining agreement must have reasonable assurance that their contract will be honored." *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 771 (1983). The Court of Appeals therefore properly found that the maintenance rates should be enforced because "[t]he national labor policy of promoting and encouraging collective bargaining agreements would be unduly compromised were we to conclude otherwise." *Gardiner*, *supra*, 786 F.2d at 949.

C. The Court Of Appeals' Decision Is Consistent With Settled Maritime Case Law

The *Gardiner* opinion presents no issue to be considered by this Court because it is consistent with settled maritime law, as well as federal labor law. Virtually every court in the past thirty years which has considered the enforcement of a collectively-bargained rate of maintenance has reached the same result.

As discussed above, courts have long held that seamen may contract with respect to maintenance and other traditional rights if they receive *quid pro quo*. *Harden v. Gordon*, *supra*, 11 F. Cas. at 485. Consistent with this *quid pro quo* principle under maritime law, courts agree that the "rate and mode of payment of maintenance" may be set by contract. *Hodges v. Keystone Shipping Co.*, *supra*, 578 F. Supp. at 622. Indeed, the district court below recognized that "parties may surely contract with respect to the rate of maintenance. . . ." Pet. App. B. at B-1. *See also Rutherford*, *supra*, 575 F. Supp. at 1373 (maintenance is a proper "subject of bargaining" between unions and employers).[8]

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the adequacy of the rate for *nonunion* seamen [citing cases]." *Id.* (Emphasis in original.)

[8] Similarly, a seaman may freely release his claim for maintenance in settlement of a lawsuit where the release agreement is fair and the seaman comprehends the rights so waived. *Bonici v. Standard Oil Co.*,

In *Hodges v. Keystone Shipping Co.*, *supra*, 578 F. Supp. 620, for example, the court set forth the legal principles underlying the rule that a maintenance rate established in a collective bargaining agreement is enforceable. In remitting a jury award of maintenance in excess of the negotiated rate, the court stated:

> [P]laintiff's rate of recovery of maintenance is limited by the NMU contract. . . . The right to maintenance originates from an individual's seaman status and is a term of the employment which cannot be contracted away. . . . The *rate and mode of payment of maintenance*, however, *can be regulated by contract*. The contract between the seaman and his employer "establishes as a matter of law, the rate of maintenance to be paid." *Id.* at 622 (emphasis added) (citation omitted).

In reaching its result, the *Hodges* court relied upon *Grove v. Dixie Carriers, Inc.*, *supra*, 553 F. Supp. 777. The plaintiff in *Grove*, like petitioners here, sought maintenance in excess of the $8.00 rate in a collective bargaining agreement. The *Grove* court denied the relief requested, stating:

> [W]here the seaman, through the Union as his representative, expressly contracts with his employer for a specific rate of maintenance, whether it be higher or lower than it would otherwise be, the contract between the seaman and his employer establishes, as a matter of law, the rate of maintenance to be paid. *Id.* at 780.

Similarly, in *Dixon v. Maritime Overseas Corp.*, 490 F. Supp. 1191 (S.D.N.Y.), *aff'd*, 646 F.2d 560 (2d Cir. 1980), *cert. denied*, 454 U.S. 838 (1981), the jury was instructed that:

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supra, 103 F.2d 437; *Clinton v. United States*, *supra*, 254 F.2d 409. Individual seamen may even waive their right to *future* maintenance if the release agreement is freely given in return for adequate consideration. *See Law v. United Fruit Co.*, *supra*, 264 F.2d 498; *Zoldan v. American Export Isbrandtsen Lines, Inc.*, *supra*, 1969 A.M.C. 471. Seamen may also contractually forego the receipt of maintenance *per se* in return for a maintenance substitute in a collective bargaining agreement. *Thomas v. Humble Oil & Refining Co.*, 420 F.2d 793 (4th Cir. 1970).

> Despite inflation or other factors, the union contract establishes the rate for payment of maintenance and cure at $8.00 per day. That is binding on the plaintiff. *Id.* at 1193.

Accord Reardon v. California Tanker Co., supra, 260 F.2d at 374-75, 376 (rate of maintenance set forth in a collective bargaining agreement is binding on both seaman and shipowner).

In addition to the foregoing cases, numerous other decisions have consistently recognized the validity of a collectively-bargained rate of maintenance and have treated such a rate as binding on the seaman. *See, e.g., Gajewski v. United States*, 540 F. Supp. 381 (S.D.N.Y. 1982); *Williams v. Barge Foss*, 528 F. Supp. 226 (W.D. Wash. 1981); *Tague v. American Pres. Lines, Ltd.*, 1975 A.M.C. 1129 (N.D. Cal. 1975); *Meade v. Skip Fisheries, Inc.*, 385 F. Supp. 725 (D. Mass. 1974); *Ladzinski v. Sterling S.S. & Trading Corp.*, 300 F. Supp. 947 (S.D.N.Y. 1969); *Bailey v. Moore-McCormick Lines, Inc.*, 280 F. Supp. 310 (S.D.N.Y. 1967); *Pedersen v. Diesel Tankers*, 280 F. Supp. 421 (S.D.N.Y. 1967); *Covert v. Centennial Queen*, 185 F. Supp. 552 (D. Or. 1960); *Vitco v. Joncich*, 130 F. Supp. 945 (S.D. Cal. 1955), *aff'd*, 234 F.2d 1161 (9th Cir. 1956).

In sum, the Court of Appeals' decision in *Gardiner* is merely the latest in a long line of decisions which respect the contractual choices regarding maintenance which have been freely made by the seamen involved.

D. The Court Of Appeals' Decision Creates No Conflict With Decisions Of This Court Or The Fifth Circuit

Notwithstanding that the Court of Appeals' decision is consistent with long-settled federal labor and maritime law, petitioners erroneously contend that the decision is in conflict with decisions of this Court and the Fifth Circuit Court of Appeals.

Petitioners argue that the Court of Appeals' decision will permit unions to "bargain away" the right to maintenance and is therefore violative of the rule stated in *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371 (1932), that "no private agreement

may abrogate the right to maintenance."[9] A simple reading of the decision belies petitioners' view of *Gardiner*. The Court of Appeals acknowledged the foregoing statement from *Cortes* (786 F.2d at 946) and was careful to point out that it would not enforce "a mere token amount [which] is designated for maintenance without a genuine *quid pro quo* arrived at through collective bargaining." *Id.* at 950. Indeed, the Court of Appeals expressly stated that an earlier Ninth Circuit decision, *Vitco v. Joncich*, 130 F. Supp. 945 (S.D. Cal. 1955), *aff'd*, 234 F.2d 1161 (9th Cir. 1956), retained vitality and would control to invalidate any such token maintenance rate arrived at without *quid pro quo*.

The Court of Appeals thus accommodated the teaching of *Cortes* with federal labor policy which "is built on the premise that employees can bargain most effectively for improvements in wages, hours, and working conditions by pooling their economic strength and acting through freely chosen labor organizations." *Id.* at 948, *citing N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). In short, the Court of Appeals correctly found that the negotiated *rate* of maintenance "does not abrogate a maritime right. Rather, it expressly recognizes the maritime right to maintenance and seeks to preserve it as part of the overall negotiating process." *Id.* at 950.

Finally, there is no conflict with *McWilliams v. Texaco, Inc.*, 781 F.2d 514 (5th Cir. 1986), as petitioners' claim. The court in *McWilliams* neither addressed nor even considered the issues presented in this case or the fundamental federal labor policies which underlie the decision of the Court of Appeals. The issue discussed by the Fifth Circuit was whether evidence of food and lodging costs in the community could be introduced in a maintenance action, irrespective of McWilliams' actual expenditures for maintenance. Indeed, to the extent that the *McWilliams* court permitted evidence of such costs for maintenance in excess of McWilliams' actual expenditures, it contradicted this Court's

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[9] It should be noted that neither *Cortes* nor the other decision cited by petitioners, *DeZon v. American President Lines*, 318 U.S. 660 (1943), involved a collectively-bargained rate of maintenance.

holding in *Johnson v. United States*, 333 U.S. 46 (1948) (no recovery for maintenance where no expenditures).

CONCLUSION

For all the foregoing reasons, defendants respectfully request that the Court deny the petition for writ of certiorari.

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APPENDIX A
SUMMARY OF SELECTED CONTRACT PROVISIONS FOR MEBA

Monthly Base Wages	Living Conditions	Work Rules	Health and Welfare	Vacation	Pension
[1981 Wages] $5,262.45 (high) $1,823.29 (low) [Indexed to CPI] for 8 hours work Monday-Friday	Free board and lodging Clean linens twice a week Engineer's lounge with TV, VCR, and movies Separate state-rooms wired for TV	In addition to base wages: Overtime rate of $15.78 to $45.56/hour for work in excess of 8 hours during weekdays and on weekends and holidays. Premium rate of $8.01/hour for "broken meal" hour, confinement to vessel in port, blowing boiler tubes, welding outside machinery areas, delayed sailing, doing work usually done by unli-censed seamen, etc. Penalty rate of $8.01/hour for working in confined or dirty spaces or dirty work, plus ten percent if after normal work hours. Non-watch allowance of $1,473.55 to $510.54/month. Penalty and overtime pay often paid simultaneously.	Major Medical Dental Hospitalization $1,500 out-of-pocket maximum per year Deductible carry-over from last quarter of previous year can be applied to fol-lowing year Optical benefit $120.00 per year	Increased from 19 days per 30 working days in 1981 to 22 days per 30 in 1984 Chief Engineers get 1 vacation day for each day worked	20 years = $340 or 40% of pay 25 years = $425 or 50% of pay 30 years = $535 or 60% of pay, whichever is higher Over 30 = 2% of pay per year up to age 65

SUMMARY OF SELECTED CONTRACT PROVISIONS FOR SIU

Monthly Base Wages	Living Conditions	Work Rules	Health and Welfare	Vacation	Pension
[1983 Wages] $2,415.90 (high) $1,081.06 (low) [Indexed to CPI] for 8 hours work Monday-Friday	Free board and lodging TV, VCR, movies Clean linens once a week Varied, posted menus Choice of entrees — meats cooked to order Guaranteed meal times or overtime ("O.T.") is paid	In addition to base wages: Premium rates of $9.49 to $20.39/hr for work performed on Sat., Sun. and holiday; Overtime rates: $6.19 to $10.20/hr for all work in excess of 8 hrs — Monday through Friday; Penalty rates: $4.20 to $17.82/hr for certain tasks like cleaning bilges and certain weekend work; rate of $8.23 to $15.42/hr for crew doing longshoremen's work Mon. to Fri.; $12.35 to $23.13/hr if on Sat., Sun. or holiday; Rate of $7.27 to $17.82 for tank cleaning; penalty and premium pay for certain tasks added to OT when performed between 5:00 p.m. & 8:00 a.m.	Major Medical, hospital, surgical, prescription drugs, optical, medical exam for Seaman and dependents Dental benefits Death benefits for beneficiary up to $15,000 Accidental dismemberment benefits Maternity benefit Mental disorder benefits Alcohol rehabilitation Upgrade and recertification education	[1981 benefit] Four months' base pay for 365 days of covered employment (i.e., one vacation day for each three days worked)	Regular Normal Pension = $240 to $1,000 per/mo Deferred Vested Pension Early Normal Pension Special Early Normal Pension Disability Pension Survivor Spouse Annuity Benefits

SUMMARY OF SELECTED CONTRACT PROVISIONS FOR NMU

Monthly Base Wages	Living Conditions	Work Rules	Health and Welfare	Vacation	Pension
[1982 Wages] $2,508.59 (high) $1,026.66 (low) [Indexed to CPI] for 8 hours work Monday-Friday	Free board and lodging Clean linens once a week TV, VCR, movies Varied menu Guaranteed meal times or O.T. is paid	In addition to base wages: Overtime rate of $9.56 to $21.72 per hour for weekday rate in excess of 8 hours and weekend and holiday work; Penalty rates of $5.11 to $3.87 for all work between 5 p.m. and 8 a.m., and certain tasks; making ice cream; spray painting, etc. $5.82 for "dirty work"; 1½ times penalty rate for cleaning tanks between 5 p.m. and 8 a.m. on overtime and penalty rate if between 8 a.m. and 5 p.m.; Longshore work at rate of New York Longshore rate, no less than $14.00 per hour, but no less than $28/hour if handling explosives; On-watch rate of 1½ times penalty rate for removing garbage, manure, cleaning bilges, working ballast; Continuous overtime if less than 2 hours break between O.T. and next scheduled work period; At least one paid day off when in port.	Hospitalization and Major Medical (Family Coverage) Life Insurance Accidental Death and Dismemberment Dental Benefits Optical Benefits Alcoholism Program Personal Services Unit Free Prescription Drugs Upgrading and Training Program including meals, stipend and travel expenses	13-17 days per 30 worked; Vacation pay approx. $150-$300 more than base monthly wage	Regular Pension Service Pension Disability Pension Pro Rata Pension Partial Pension Vested Pension Survivor Spouse pension